Supreme Court, U.S.
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NO.

IN THE

# Supreme Court of the United States

PETER ROEHSLER,
*Petitioner*

V.

MIDDLESEX COUNTY HEALTH DEPARTMENT

On Petition For Writ Of Certiorari
To The Supreme Court of New Jersey

## PETITION FOR WRIT OF CERTIORARI

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40 pp

## QUESTIONS PRESENTED

1. Whether N.J.S.A. 13:1D-9d, which gives the government the power to enter any building or place, at any time, without a search warrant and based on nothing more than a suspicion of an environmental violation, that need never be articulated in any way, is offensive to and violates the Fourth and Fourteenth Amendments to the United States Constitution.
2. Whether N.J.S.A. 34:5A-29b, in which the government gives itself the right to enter any employer's facility without a search warrant and with no restriction other than that it be done during normal operating hours, violates the Fourth and Fourteenth Amendments to the United States Constitution.
3. Whether N.J.A.C. 7:1G-1.5, which authorizes the government to enter any business premises or building without a search warrant, while requiring nothing more than the presentation of credentials, and provides for criminal penalties against anyone who resists, violates the Fourth and Fourteenth Amendments to the United States Constitution.
4. Whether the New Jersey Supreme Court violated this petitioner's constitutional rights under the Fifth and Fourteenth Amendments to the United States Constitution by upholding the assessment of $5,000 in fees against him without affording him the opportunity to be heard to protect and enforce his rights.

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# In the Supreme Court of the United States

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No. _____

**PETER ROEHSLER,**
**Petitioner,**
**v.**

**MIDDLESEX COUNTY HEALTH DEPARTMENT**

---

## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY

Peter Roehsler respectfully requests that this Court issue a writ of certiorari to review the judgement of the Supreme Court of the State of New Jersey dismissing this petitioner's Appeal as of Right and his Petition for Certiorari to the Appellate Court thus upholding the constitutionality of N.J.S.A. 13:1D-9d, N.J.S.A. 34:5A-29b and N.J.A.C. 7:1G-1.5 and, as well, upholding the Appellate Division of the New Jersey Superior Court, that found that petitioner's Fifth and Fourteenth Amendment rights had not been violated.

### Opinions Below

None of the opinions below have been reported. The opinions of the New Jersey Supreme Court, the Appellate Division of the Superior Court of New Jersey and the New Jersey Superior Court are

reproduced in the Appendix to this petition. App.,*infra*, 1a-9a.

## Jurisdiction

The judgement of the New Jersey Supreme Court was rendered on October 17, 2002. This petition is filed within the ninety day time limit provided by Rule 13 of the Rules of this Court. This Court's jurisdiction is invoked under 28 U.S.C. 1257 (a) and Rule 10(c) of the rules of this Court.

Because 28 U.S.C. 2403(b) may apply, three copies of this petition and appendix have been served on David Samson, Attorney General for the State of New Jersey.

## Constitutional and Statutory Provisions Involved
(reproduced at Appendix, *infra*, 14a-16a)

1. United States Constitution, Fourth Amendment
2. United States Constitution, Fifth Amendment
3. United States Constitution, Fourteenth Amendment
4. New Jersey Statutes Annotated 13:1D-9d
5. New Jersey Statutes Annotated 34:5A-29b
6. New Jersey Administrative Code 7:1G-1.5
7. New Jersey Court Rule 4:42-1(c)

## STATEMENT OF THE CASE

### Introduction

On or about October 2, 2000, a Middlesex County Health Department investigator was conducting recycling generator inspections in the Borough of Sayreville, New Jersey, and noticed that petitioner's property, commonly known as Viking Terminal, was not on his list of places to inspect. He nevertheless proceeded onto the property and commenced his search whereupon he was confronted by petitioner's daughter, Kersten, who ordered him to leave the property, which he did. Upon his entry onto the property the investigator passed an 8 foot by 10 foot bright yellow sign admonishing "NO TRESSPASSING, Private Property."

Petitioner's property comprises approximately sixty acres where he operates his businesses and rents to many tenants. He also has made his home there for twenty-eight years. The public is barred from entering the property.

The petitioner refused to give consent to a warrantless inspection or search of his property. Subsequently, the county corresponded with your petitioner via letter, facsimile and telephone conversations wherein the county threatened litigation. The petitioner merely asserted his rights under the Fourth Amendment to the United States Constitution and insisted that the county obtain a search warrant.

**The order to show cause**

On January 10, 2001, the Middlesex County Health Department filed a verified complaint in the Superior Court of New Jersey and an order to show cause against your petitioner, demanding an order permitting them to inspect petitioner's property without a warrant. Their case, in chief, was based on N.J.S.A. 13:1D-9a, N.J.S.A. 34:5A-29b and N.J.A.C. 7:1G-1.5, all of which permit the government to enter private property without a search warrant.

On January 29, 2001, this petitioner filed a timely answer to the verified complaint. On February 16, 2001, a hearing was held wherein the petitioner asserted his constitutional right to be free from warrantless searches. The constitutional issues were raised by the petitioner in letter memorandum and oral argument. (2/16/01 Tr. 9) The court responded that "... understand that while the constitution certainly is a good document..." that "...this isn't going to be a constitutional law symposium." The hearing ended with the matter being adjourned. 2/16/01 Tr. 27 & 29.

On July 6, 2001, the adjourned hearing was continued and petitioner once again asserted his right to be free of warrantless searches. The court held that there was a connection between the highly regulated solid waste industry and the non-highly regulated businesses operated by petitioner and other non-highly regulated businesses that rent from him and for that

narrow reason, it would order that the inspection could proceed without a warrant.

On July 13, 2001, the Middlesex County Health Department's attorney submitted a proposed form of order that did not conform to the court's ruling in that it provided for your petitioner to pay $12,490.46 in fees to the county. Absolutely no mention of costs or fees had been brought up by anyone in open court when the ruling was handed down. Petitioner timely objected to the proposed form of order, but the court signed it over his objection and, with no further hearing, reduced the fee award to $5,000.

**The Appeals**

On November 13, 2001, your petitioner timely filed an appeal to the Appellate Division of the New Jersey Superior Court. That appeal again asserted petitioner's right to be free from warrantless searches and also asserted his right to due process, which he contended had been violated in the trial court by depriving him of $5,000 without a hearing.

The county filed a reply brief which asserted that the proposed form of order it submitted was conforming (to the court's ruling). Your petitioner properly responded according to court rules that the proposed form of order was not conforming.

On June 11, 2002, the Appellate Court ruled that petitioners arguments were without sufficient merit to warrant discussion on the record. It did however comment that the county's order was conforming and that the petitioners rights were not violated because he did not specifically request a hearing.

On July 11, 2002, this petitioner timely filed an Appeal as of Right and a Petition for Certiorari to the Appellate Division of the New Jersey Superior Court. Petitioner again asserted his rights under the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States. On October 17, 2002 that court dismissed without comment both the Appeal as of Right and the Petition for Certiorari.

This petition for certiorari challenges the decision of the New Jersey Supreme Court to dismiss your petitioner's Appeal as of Right and his Petition for Certiorari to the Appellate Division of the New Jersey Superior Court and let stand the rulings of that court.

## REASONS FOR GRANTING THE WRIT

**1. The decision below directly conflicts with numerous decisions of this Court which should have been dispositive of the case against petitioner. The rights of the people are eroded little by little and this Court should use its power to stop it.**

In *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973), Mr. Justice Stewart, speaking for the Court said:

> "The needs of law enforcement stand in constant tension with the constitution's protections of the individual against certain exercises of official power. It is precisely the predictability of these pressures that counsels a resolute loyalty to constitutional safeguards. It {413 U.S. 266, 274} is well to recall the words of Mr. Justice Jackson, soon after his return from the Nuremberg Trials:
>
> "These {Fourth Amendment rights}, I protest, are not mere second class rights but belong in the catalog of indispensable freedoms. Among deprivations of rights, none is so effective in cowing a population, crushing the spirit of the individual and putting terror in every heart. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government." *Brinegar v. United States*, 338 U.S. 160, 180 (1949) (Jackson, J., dissenting).

The New Jersey Supreme Court has not addressed the issue of warrantless administrative inspections or searches in any reported opinions.

The Appellate Division of the New Jersey Superior Court has addressed it only once in *State v. Dolce*, 178 N.J. Super. 275, 278 A.2d 947 (App. Div. 1981). In that case its ruling comported with this Court by holding that an administrative search of private property without proper consent is generally held unconstitutional unless it has been authorized by a valid search warrant. That opinion was ignored by all of the courts below.

N.J.S.A. 13:1D-9 is unconstitutional on it's face because it empowers the government to enter into any building or place (obviously this includes private homes, houses of worship, etc.), at any time, without benefit of warrant or probable cause and based merely on some perceived suspicion of a government official with no constraints on when or how the search may be conducted or even that it is reasonable in any way.

> "The department shall in addition to the powers and duties vested in it by this act or by any other law have the power to:
>
> (d) Enter and inspect any building or place for the purpose of investigating an actual or suspected source of pollution of the enviornment and ascertaining compliance or noncompliance with any codes, rules and regulations of the department." N.J.S.A. 13:1D-9d

It is patently offensive to the American experience to have a government that has empowered itself to search any place based on nothing more than

an unarticulated suspicion. A government officer could say he was driving past a home or business and on the barest of suspicion that something seemed amiss for some reason he could enter and search. He need never articulate his suspicion or, if he is for some reason compelled to, he can make up his story after the fact. This is precisely why we need the Fourth Amendment protections, so that the government officer must set forth his story before the fact and that he be under oath or that his statement is otherwise sworn to. It is flatly unreasonable to permit a government to search on nothing more than a naked suspicion that need not be articulated in any way, either before or after the fact, and goes against everything our constitution has guaranteed us.

The framers of our constitution inserted language which is abundantly clear: "the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated..." *Fourth Amendment to the United States Constitution.* The protection is afforded to every citizen and, as well, to businessmen and women. This proposition has been consistently upheld by this Court. In *Marshall v. Barlow's Inc.*, 436 U.S. 307, 98 S.Ct. 181, 56 L.Ed.2d 305 (1978), Mr. Justice White, speaking for the court, said:

> "The Warrant Clause of the Fourth Amendment protects commercial buildings as well as private homes. To hold otherwise would belie the origin of that Amendment, and the

American colonial experience... '[T]he Fourth Amendment's commands grew in large measure out of the colonists' experience with the writs of assistance...[that] granted sweeping power to customs officials and other agents of the king to search at large for smuggled goods.' *United States v. Chadwick*, 433 U.S. 1, 7-8 (1977) [436 U.S. 307, 312] See also *G.M. Leasing Corp. v United States*, 429 U.S. 338, 355 (1977). Against this background, it is untenable that the ban on warrantless searches was not intended to shield places of business as well as of residence."

"This Court has already held that warrantless searches are generally unreasonable, and that this rule applies to commercial premises as well as homes. In *Camara v. Municipal Court*, [387 U.S. 523 (1967)] , at 528-529 we held:

'[E]xcept in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant.'

On the same day, we also ruled:

'As we explained in *Camara*, a search of private houses is presumptively unreasonable if conducted without a warrant. The businessman, like the occupant of a residence, has a

constitutional right to go about his business free from unreasonable official entries upon his private commercial property. The businessman, too, has that right placed in jeopardy if the decision to enter and inspect for violation of regulatory laws can be made and enforced by the inspector in the field without official authority evidenced by a warrant." *See v. Seattle*, 387 U.S. 541 (1967), at 543.

In the case at bar, the county investigator found that petitioner's property was not on his list of places to inspect and arbitrarily decided to inspect or search it. In the eight years since recycling generator inspections began, Viking Terminal had never been inspected, so we cannot possibly conclude that there was any regularity to the inspections. It was clearly the arbitrary decision of the officer in the field to attempt the inspection. In *Donovan v. Dewey*, 452 U.S. 594, 101 S.Ct. 2534, 69 L.Ed.2d. 262 (1981) Mr. Justice Marshall, speaking for the court, said:

> "...the Act does not provide any standards to guide inspectors either in their selection of establishments to be searched or in the exercise of their authority to search. The statute instead simply provides that such searches must be performed 'at...reasonable times, and within reasonable limits and in a reasonable manner.' "

> "In assessing this regulatory scheme, this Court found that the provision authorizing administrative searches "devolves almost unbridled discretion upon executive and administrative officers, particularly those in the field, as to when to search and whom to search." 436 U.S., at 323. Accordingly, we concluded that a warrant was constitutionally required to assure a nonconsenting owner, who may have little real expectation that his business will be subject to inspection, that the contemplated search was 'authorized by statute, and...pursuant to an administrative plan containing specific neutral criteria.'" Ibid.

What happened here is clearly offensive to the constitution and the prior holdings of this Court because there was no regularity to the inspection and it was the result of an arbitrary decision of the inspector in the field.

Although they apply to places of business and not private homes, N.J.S.A. 34:5A-29b and N.J.A.C. 7:1G-1.5 are unconstitutional for essentially the same reasons as discussed above, but neither one requires even a suspicion in order for the government to search. All a government officer need do is show up and present his credentials whereupon he is free to search any building or place at will.

N.J.A.C. 7:1G-1.5 provides that "Failure to permit such

inspection after presentation of official credentials is a criminal offense punishable under N.J.S.A. 2C:29-1" which is "Obstructing the administration of law or other governmental function." Although petitioner was not charged under this statute, the $5,000 in fees that were assessed against him constitute a very substantial penalty, which exceeds by fifty-fold the penalty assessed against *Camara* that this Court held unconstitutional . It would be a flight of fancy to suggest that the fees assessed against this petitioner without a hearing are not a penalty, disguised perhaps, but a penalty for asserting his constitutional rights nonetheless.

In *Camara v. Municipal Court, supra,* Mr. Justice White, speaking for the Court, said:

> "Yet, only by refusing entry and risking a criminal conviction can the occupant at present challenge the inspector's decision to search. We simply cannot say that the protections provided by the warrant procedure are not needed in this context; broad statutory safeguards are no substitute for individualized review, particularly when those safeguards may only be invoked at the risk of criminal penalty."

The cited statutes and the administrative code (which carries the full force and effect of law) are unconstitutional on their face, not for narrow reasons, but for articulated and egregious constitutional violations. It was error for the courts below to grant the warrantless inspection of petitioner's property.

**2. To hold that a mere connection to a highly regulated business (as nothing more than a customer) raises a non-highly regulated business to the same level as a highly regulated one is absurd. This reasoning effectively strips all businessmen and women of constitutional protection.**

The only opinion we have to consider here is the oral ruling of the Superior Court of New Jersey (App., *infra*, 5a-8a) which has not been modified by any higher court. That opinion is somewhat tortured because it tries to confine itself to this petitioner and his tenants, but it clearly applies to any business. Nonetheless, why should the petitioner's non-highly regulated businesses and the various other non-highly regulated businesses that rent space from him be singled out and have their constitutional rights taken away from them?

This Court has dealt with the definition of highly regulated industries and has distinguished them from ordinary businesses by a long tradition of government supervision of which any person who enters that business must be aware.[1] The businessman in a highly regulated industry in effect consents to the restrictions placed upon him. The fact is, it amounts to a contract

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[1] See *United States v. Biswell*, 406 U.S. 311, 92 S.Ct. 1593, 32 L.Ed.2d 87 (1972) (firearms dealers); *Colonnade Catering Corp., v. United States*, 397 U.S. 72, 90 S.Ct. 744, 25 L.Ed.2d 60 (1970) (liquor dealers); *Donovan v. Dewey*, 452 U.S. 594, 101 S.Ct. 2534, 69 L.Ed.2d. 262 (1981) (mine/quarry operators); *New York v. Burger*, 482 U.S. 691, ?? S.Ct. 2636, 96 L.Ed.2d 601 (1987) (automobile junkyard operator)

between the business and the government wherein the businessman consents to inspections as a condition to obtain his license to ply his trade, which of course confers onto him the benefits of being so licensed.

The government's right to enter a highly regulated business is limited to the regulated activities involved. It is not an unfettered authority to search for whatever it chooses or wherever it chooses. The Middlesex County Health Department may well have the authority to enter and inspect businesses engaged in the solid waste industry, but this in no way gives it any right to enter any business at will. If the proposition that the county health department has the right to enter any building or place at any time were accepted, we would have a super agency whose powers exceed anything this country has ever seen and whose existence nullifies the Constitution of the United States.

A highly regulated business, long subject to intense government supervision is just that. Even the most creative construction will not permit the inclusion of non highly regulated businesses into that class for the purpose of denying their constitutional rights or for any reason.

This Court has dealt with a tortuous effort to broad brush all businesses as being highly regulated in *Marshall v. Barlow's Inc.* There the Secretary of Labor sought to support a conclusion that all businesses effecting interstate commerce have long been subject to close supervision of employee safety and health

conditions. He also sought to convince the Court that the imposition of minimum wages and maximum hours on employers who contracted with the government under the Walsh-Healy Act, prepared the entirety of American interstate commerce for regulation of working conditions to the minutest detail. This Court was not convinced and held that:

> "Nor can any but the most fictional sense of voluntary consent to later searches be found in the single fact that one conducts a business effecting interstate commerce, under current practice and law, few businesses can be conducted without having some effect on interstate commerce." *Marshall vs. Barlow's, supra*

Indeed even fewer businesses can be conducted without generating some garbage. To allow warrantless searches of non highly regulated businesses simply because they generate some garbage contradicts the holdings of this Court. Because no assertion has ever been made that any of the businesses at Viking Terminal are highly regulated, we need not explore that issue further.

**3. The New Jersey Courts have denied this petitioner's right to due process in violation of the Fifth and Fourteenth Amendments by assessing $5,000 in fees against him without a hearing .**

When the trial court entered its ruling allowing a warrantless search, it instructed the attorney for the Middlesex County Health Department to prepare a form of order. This instruction is standard in the New Jersey Superior Court, where the prevailing attorney is instructed to prepare a proposed form of order that conforms to the court's ruling. County's attorney prepared a proposed form of order that awarded itself $12,490.36 in fees and costs against petitioner. The matter of fees and costs were not raised in court and the proposed form of order did not conform to the court's ruling because that ruling made no mention of fees. According to court rules, petitioner timely objected to the award of fees. The court, over petitioner's objection and without affording him the opportunity to be heard, awarded the county health department $5,000.

The Appellate Division of the New Jersey Superior Court commented that the form of order submitted by the county health department was conforming, when in fact it was not, and that petitioner was not entitled to a hearing because he did not specifically request one.

The Chief Judge of the Appellate Division of the New Jersey Superior Court, Sylvia Pressler, has written in her universally accepted comment to the New Jersey Court Rules that "It is, of course, clear that an order should never be either submitted or signed under this rule unless it memorializes court dispositions, follows a default or has all parties' consent endorsed thereon."

PRESSLER, Current N.J. COURT RULES, comment R.4:42-1(c)(GANN). Clearly the county's proposed form of order did not memorialize the court's ruling and the form of order should never have been either submitted or signed. Petitioner has been denied due process of law by the New Jersey Court's under their own rules.

The Appellate Division of the Superior Court of New Jersey, whose opinion was not modified by the New Jersey Supreme Court, conclusively presumed that petitioner was liable to lose his $5,000 and that he was not entitled to the opportunity to be heard and to enforce and protect his rights. This is not due process of law.

Both the Fifth and Fourteenth Amendments to the Constitution of the United States provide that no person shall be deprived of property without due process of law. The New Jersey Courts have deprived your petitioner of $5,000 without due process of law and therefore violated the proscription against that provided for by the Fifth and Fourteenth Amendments to the Constitution.

## CONCLUSION

This case is of great national importance because the states must not be permitted to enact or enforce laws that infringe upon or violate the rights guaranteed to each of their citizens by the United States Constitution. The Constitution is more then just a good document, it is the supreme document from which all of our laws are derived. Your petitioner most respectfully urges that a writ of certiorari be granted.

Respectfully submitted,

Peter Roehsler
Petitioner, pro se

January 10, 2003

## APPENDIX A

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

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No. A-6486-00T3

MIDDLESEX COUNTY HEALTH DEPARTMENT
Plaintiff - Respondent

vs.

PETER ROEHSLER
Defendant - Appellate

On Appeal from Superior Court of New Jersey,
Law Division, Middlesex County, L-274-01

Submitted June 3, 2002
Decided and Filed June 11, 2002

Before: Dennis J. Braithwaite and Donald S. Coburn
Judges of the Appellate Division

* * * * * * * * * * *

PER CURIAM

On October 2, 2000, plaintiff attempted to perform a warrantless recycling compliance inspection at defendant's property, known as Viking Terminal,

pursuant to N.J.S.A. 13:1E-1 et seq.; N.J.S.A. 26: 3A-21 et seq.; and N.J.A.C. 7:1G-1.5. Defendant refused to give consent to the inspection. As a result, plaintiff filed a verified complaint in the Law Division seeking the right to carry out the inspection and requesting attorney's fees for the costs involved in prosecuting the action. An order to show cause was issued, defendant filed an answer, and, on the adjourned return date of the order to show cause, the court granted the relief sought in the complaint, including an award of $5,000 in counsel fees. Defendant appeals, and we affirm.

The facts are not in dispute. Viking Terminal is a large industrial park containing defendant's marine supply business and several other commercial tenants involved in activities likely to generate highly regulated waste products such as motor oil, coolants, chemicals, metals and tires, materials which, if not properly recycled or disposed of, can pose a dangerous threat to the environment. As already noted, when plaintiff's inspector arrived to perform a warrantless inspections of the premises, defendant refused to comply.

On appeal, defendant offers the following arguments:

POINT I

COURT BELOW HAS ERRED BY HOLDING THAT A TENUOUS RELATIONSHIP (THAT THEY GENERATE GARBAGE) TO A INTENSIVELY REGULATED INDUSTRY IS SUFFICIENT TO PERMIT WARRANTLESS SEARCHES OF ANY BUSINESS.

POINT II

WHERE COURT BELOW HAS HELD THAT DEFENDANT-APPELLANTS POSITION IS "CERTAINLY NOT FRIVOLOUS", IT IS ERROR TO AWARD COSTS AND FEES. THE NET EFFECT OF THIS AWARD IS TO CHILL LEGITIMATE DESENT(SIC) OF THE POPULACE TO GOVERNMENT ACTION.

POINT III

WHERE COURT BELOW HAS AWARDED COUNSEL FEES TO PLAINTIFF-RESPONDENT WITHOUT NOTICE OR MOTION, IT HAS DENIED DEFENDANT- APPELLANT'S RIGHT TO DUE PROCESS.

After considering the record and briefs, we are satisfied that all of defendant's arguments are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E). However, we add the following comments with respect to the award of counsel fees.

N.J.S.A. 13:1E-9(d)(2) provides for a fee award in cases where an inspection is blocked by the defendant. After the court rendered its oral opinion allowing the inspection, plaintiff submitted a conforming order, which included a request, supported by counsel's certification and billing records, for $12,490.46 in fees. Defendant received those documents and wrote to the

court, objecting on the ground of lack of notice, and further arguing that a fee award was inappropriate because the court had acknowledged that his position was not frivolous. Rather than requesting an opportunity to appear in court, defendant simply urged a rejections of the fee request, without questioning in any respect the amount sought. Nonetheless, the trial court reduced the fee award to $5,000. Obviously, defendant had notice of the application, therefore, his third point has no factual support.

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.

/s/James Flynn
Clerk of the Appellate Division

## APPENDIX B

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - MIDDLESEX COUNTY

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Docket No. MID-L-274-01

MIDDLESEX COUNTY HEALTH DEPARTMENT
Plaintiff,

v.

PETER ROEHSLER
Defendant.

Argued February 16, 2001 and July 6, 2001
Decision July 6, 2001

Opinion by Melvin L. Gelade, J.S.C.

* * * * * * * * * * * *

The opinion begins on page 15, line 16 of the transcript of July 6, 2001:

THE COURT: All right, The - as - as I read the - the statute in question, which is 13:1D-9d, which gives the county Health Department the authority to conduct warrantless searches to enter and inspect the building or place for purposes of investigating actual or suspected sources of pollution of the environment and

ascertaining compliance or noncompliance with codes -- codes, rules and regulations of the Department of Environmental Protection and in this case the county Health Department, which acts in their stead, for me to -- Mr. Roehsler, you have I think articulated in your papers the issues very clearly. You've cited the cases. You've done as fine a job as I think a lawyer could have done under these circumstances. And certainly this is not a -- not a frivolous case.

But on the other hand, I do have a department which is charged with the public protection of the environment and in which the facilities involved in the handling, storage and use of solid waste including recycling centers and landfills are highly regulated and what goes into those landfills is highly regulated. And while it can to some extent be enforced at the point of delivery, there's also in -- in the case of businesses, which could be the source of pollutants, I believe there's a connection between the highly regulated industry, the protection of the public interest and the need for the Health Department in this case to have access to those companies in order to fulfill their mission of protecting the public.

And for that narrow reason I -- I'm going to find that the plaintiff has established a basis under the statute for making the inspection; that the inspection will only have -- permit the county Health Department access to the business portions of the property, not to Mr. Roehsler's home. And further, that at any time that the plaintiff Health Department inspects the premises that Mr. Roehsler or a representative of Mr. Roehsler

will be permitted to accompany the inspector on those inspections.

On the other hand, I – I want to make it clear that when I say the – the home I'm talking about the living dwelling space of Mr. and Mrs. Roehlser, not that I live on the entire property and therefore, the entire acreage and all the businesses contained are part of my residence. I want to make it clear that we're talking about the living space. Nobody's going to come to your home, sir, and disturb you.

But I – I'm going to grant the application of the Health Department for an order, as I've said, permitting them to enter the property and have access to do the inspections under N.J.S.A. 13:1D-9D. Again, accompanied by either Mr. Roehsler or a designated representative at that time.

So Miss Mercado, if you could prepare an order and submit it?

MS. MERCADO: Yes, Your Honor.

MR. ROEHSLER: Your–

MS. MERCADO: I have one more just clarification. If in that order I may set a date by when the inspection should be completed by just so that the inspection isn't prolonged, you know, until the end of the year. If we could like set maybe it by in a month and a half if the inspection is – it does take place in the order?

THE COURT: Well, I would - I would suspect that you can do that within 30 days.

MS. MERCADO: Okay

MR. ROEHSLER: Your Honor, I would request that you stay your order pending our opportunity to appeal.

THE COURT: That application is denied. I don't see any reason to stay it. But you can apply to the Appellate Division for an emergency.

MR. ROEHSLER: Okay.

THE COURT: Okay?

MR. ROEHSLER: Thank you.

THE COURT: Thank you very much.

MS. MERCADO: Thank you, Your Honor.

End

**APPENDIX C**

SUPREME COURT OF NEW JERSEY

C-222 September Term 2002
53,320

MIDDLESEX COUNTY HEALTH DEPARTMENT
Plaintiff-Respondent,

v.

PETER ROEHSLER
Defendant-Petitioner

Filed October 17, 2002

On Petition for Certification

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-6486-00 having been submitted to the Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied, with costs; and it is further

ORDERED that the appeal filed in the within matter is dismissed pursuant to Rule 2:12-9.

WITNESS, the Honorable Deborah T. Poritz, Chief Justice, at Trenton, this 15th day of October, 2002.

/s/ Stephen Townsend
Clerk of the Supreme Court

**********

**APPENDIX D**

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION – MIDDLESEX COUNTY

---

Docket No. MID-L-274-01

MIDDLESEX COUNTY HEALTH DEPARTMENT

v.

PETER ROEHSLER

---

Order of Judge Melvin L. Gelade
Filed July 20, 2001

**********

THIS MATTER having been opened to the court by Weiner Lesniak, attorneys for plaintiff, the Middlesex County Health Department ("the Health Department"), with Paula J. Mercado, Esq., appearing on behalf of the Health Department, in the presence of defendant Peter Roehsler ("defendant"), appearing pro se, on an application for an Order authorizing the Health Department to enter defendant's property, Viking Terminal located on Jernee Mill Road in Sayreville, New Jersey, for the purposes of conducting compliance inspections pursuant to the Health Department's powers of compliance monitoring and enforcement, and the court having considered the Verified Complaint, supporting and opposing Briefs and Certification, and the court considering the arguments of counsel and of defendant, and the court having rendered an oral decision on July 6, 2001, which is incorporated herein by reference, and for good cause shown:

It is on this 20th day of July, 2001,

ORDERED that the Health Department is authorized to enter defendant's property, Viking Terminal, for the purpose of conducting compliance recycling inspections pursuant to the Health Department's powers of compliance monitoring and enforcement;

ORDERED that defendant shall allow the Health Department to enter all areas of Viking Terminal, not including the private dwelling space of defendant and

that of his family, for the purpose of conducting compliance recycling inspections of Viking Terminal, and that defendant, or an individual designated by defendant, may accompany the Health Department's officials and/or representatives in conducting such inspection;

ORDERED that the Health Department's routine compliance inspections of Viking Terminal is to be completed no later than thirty (30) days from the date of entry of this Order;

ORDERED that defendant shall be obligated to pay the attorneys fees and court costs incurred by the Health Department in investigating and prosecuting this matter, in the amount of $5,000.00 if defendant is not successful with appealing this decision. If defendant is successful upon appealing this decision and this court's decision is reversed then defendant does not have to pay the $5,000.00.

IT IS FURTHER ORDERED that counsel for plaintiff shall serve a true copy of this Order upon defendant by certified mail, return receipt requested, and by regular mail, within 7 days of its receipt by counsel for the Health Department.

/s/ Honorable Melvin L. Gelade, J.S.C.

## APPENDIX E

July 16, 2001

Hon. Melvin L. Gelade, J.S.C.
Middlesex County Superior Court
One John F. Kennedy Square
Chambers #201
New Brunswick, New Jersey 08903

RE: Middlesex County Health Department
v. Peter Roehsler
Docket No. MID-L-274-01

Dear Judge Gelade:

Pursuant to the five day rule, this Defendant strenuously objects to the entry of the proposed form of Order submitted by Paula Mercado, Esquire.

The Court has ruled and Ms. Mercado now, without notice, seeks to reopen this matter. Indeed, she had ample opportunity to make her motion before Your Honor in open court on July 6th, 2001.

As Your honor stated from the bench, my position is not frivolous, and for that reason alone there is no justification for after the fact award of fees. I respectfully urge Your Honor to redact Ms. Mercado's Order in as far as it refers to fees and costs.

Respectfully,
/s/ Peter Roehsler

## APPENDIX F

Constitutional Provisions:

Fourth Amendment: The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fifth Amendment: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

Fourteenth Amendment, Section 1: All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the

privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

N.J.S.A. 13:1D-9 states: The department shall formulate comprehensive policies for the conservation of the natural resources of this State, the promotin of enviornmental protection and the prevention of polution of the enviornment of the State. The department shall in addition to the powers and duties vested in it by this act or by any other law have the power to:

d. Enter and inspect any building or place for the purpose of investigating an actual or suspected source of pollution of the environment and ascertaining compliance or noncompliance with any codes, rules and regulations of the department.

N.J.S.A. 34:5A-29b states: The Department of Environmental Protection shall have the right to enter an employer's facility during the normal operating hours of the facility to determine compliance with subsection b. of section 7 and section 9 of this act, and any rules and any regulations adopted pursuant thereto.

N.J.A.C. 7:1G-1.5 states: Pursuant to N.J.S.A. 13:D-9 and 34:5A-29b, the Department shall have the authority to enter any business premises or building during normal hours or other reasonable time to determine compliance with the rules and regulations of the Department hereunder. Failure to permit such inspection after presentation of official credentials is an offense punishable under N.J.S.A. 2C:29-1.

N.J. Court Rule 4:42-1(c) states: Settlement on Notice. In lieu of settlement by motion or consent, the party proposing the form of judgment or order may forward the original thereof to the judge who heard the matter and shall serve a copy thereof on every other party not in default together with a notice advising that unless the judge and the proponent of the judgment or order are notified in writing of specific objections thereto within 5 days after such service, the judgment or order may be signed in the judge's discretion. If no such objection is timely made, the judge may forthwith sign the judgement or order. If objection is made, the matter may be listed for hearing in the discretion of the court.

Comment to Rule 4:42-1(c) states in part: This paragraph was amended, effective September 1977, to make clear that the granting of a hearing on the form of order is a matter within the court's discretion. The trial judge is free to enter the order without hearing and despite objections if, for example, he is satisfied that the form comports with his directives and the objections are frivolous or, on the other hand, if he is satisfied that

the objections are meritorious, in which case he may himself amend the form of order as submitted. It should, of course, be pointed out that the trial court is always free to enter or modify the form of order as submitted where the objection raised by the opposing party fails to state the reasons therefor. It is, of course, clear that an order should never be either submitted or signed under this rule unless it memorializes court dispositions, follows a default or has all parties' consent endorsed thereon. Sylvia Pressler, J. A. D.

Supreme Court, U.S.
FILED
FEB 6 2003

No. 02-1064

IN THE

# Supreme Court of the United States

PETER ROEHSLER,

*Petitioner,*

*v.*

MIDDLESEX COUNTY, NEW JERSEY,
HEALTH DEPARTMENT,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

## BRIEF IN OPPOSITION

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## COUNTER-STATEMENT OF THE CASE

### PRELIMINARY STATEMENT

The recycling and solid waste laws in New Jersey govern a pervasively regulated industry that has been a matter of grave public concern for several decades and oft-times in crisis. Respondent Middlesex County Health Department has been expressly authorized by the New Jersey Department of Environmental Protection to conduct environmental inspections of commercial properties in order to monitor compliance with the recycling and solid waste regulations. This State has expended considerable time and resources to cleanup the environment and bring the waste industries into the modern era of recycling, proper end-use and a competitive marketplace. New Jersey can ill afford to have further environmental harm done by commercial and industrial establishments that might opt for the protection of privacy and darkness to engage in waste disposal activities.

In October 2000, Middlesex County attempted to conduct a routine recycling inspection of an industrial complex owned and operated by Petitioner Roehsler, doing business as the Viking Terminal in Sayreville, New Jersey. Petitioner refused to allow any entry by county inspectors and threatened criminal response. Proper resort to the courts has resulted in a determination that Middlesex County has the authority to undertake that inspection and has not violated the constitutional rights of the Petitioner. The Courts below have upheld that reasonable determination. This Court should leave those holdings undisturbed.

## COUNTERSTATEMENT OF FACTS

Pursuant to its obligations under the Solid Waste Management Act, N.J.S.A. 13:1E-1, *et seq.* ("SWMA"), Middlesex County ("County") developed and adopted the Middlesex County Solid Waste Management Plan ("County Plan") which comprehensively sets forth the County's solid waste disposal and recycling strategies. These strategies include "procedures for coordinating all activities related to the collection and disposal of solid waste by every person engaging such process within the solid waste management district." N.J.S.A. 13:1E-1. Public notice and hearings were held on the development and proposal of the County Plan in accordance with the provisions of SWMA. The public hearings afforded all interested persons an opportunity to submit comments and formal written objections to the County Plan. N.J.S.A. 13:1E-23. The County Plan was duly adopted by the County and then approved by the New Jersey Department of Environmental Protection ("NJDEP"), after notice to all relevant government agencies for comment. N.J.S.A. 13:1E-23(g)-(h).

The Middlesex County Health Department ("Department") is designated and certified by the NJDEP as the local environmental health agency under the County Environmental Health Act, N.J.S.A. 26:3A2-21, *et seq.* ("CEHA"). CEHA provides for the administration of environmental health services by county departments of health throughout the State utilizing uniform performance standards promulgated by NJDEP. Pursuant to CEHA, the Department is empowered to act on behalf of NJDEP in Middlesex County and to enforce the various State statutes, rules and regulations relating to environmental health, including, but not limited to, SWMA and the County Plan. CEHA further provides that

the administration of the responsibilities of a CEHA county health department shall include the following:

> The monitoring and enforcement of environmental health standards, the operation of a technical resource center and the enactment and enforcement of environmental health ordinances to control air pollution, solid waste, hazardous waste, noise, pesticides, radiation, and water pollution, to protect workers and the public from hazardous substances and toxic catastrophes, and to protect against other threats to environmental health.

[N.J.S.A. 26:3A2-22] CEHA defines "monitor" to mean "check, test, observe, survey or **inspect to determine compliance** with environmental health standards." N.J.S.A. 26:3A2-23(e) (emphasis added). A CEHA certified agency also has been delegated the authority granted to the NJDEP to act as its agent in areas involving environmental health. This includes the right to enter and inspect "any business premise or building during normal hours or other reasonable times." N.J.A.C. 7:1G-1.5. Failure by a business to allow such an inspection after presentation of official credentials is a criminal offense. N.J.S.A. 2C:29-1. Thus, CEHA expressly confers upon county health agencies the authority to conduct inspections in order to determine compliance with the County Plan and SWMA. N.J.S.A. 26:3A2-25.

Viking Terminal ("Terminal") is a large industrial park owned and operated by Petitioner Peter Roehsler in an industrial section of Sayreville, New Jersey. Within the Terminal, Roehsler operates his marine supply business, Viking Terminal Marine Company ("Viking Marine") and

leases space within the Terminal to several other businesses, which also operate on the property. According to the records of the Sayreville Bureau of Fire Safety, the businesses located at the Terminal include Elmar Trucking, M.T. Performance, Delcanzo Trucking, Avalanchi Global, Santora Electric, Silver Star, Dave's Towing, Allegro Enterprises, Advanced Cleaning Systems, Riccardi Trucking, B&T Auto, Ju Jo Livery, RTM Contractors, Al's Cycle and Atlantic Fabricators, in addition to Viking Marine.

These businesses involve services related to automotive, trucking, electrical, cleaning, air conditioning and fabrication. As such, it is axiomatic that these industrial sites could result in the generation of highly regulated waste products and recyclables, such as motor oil, coolants, chemicals, metals and tires. These materials, if not properly recycled or disposed of, can pose a dangerous threat to the public's health and safety and the environment. As with other business and commercial establishments, the Department conducts regular recycling compliance inspections in order to ensure that these waste materials are being properly handled.[1]

---

1. The compliance requirements for commercial and institutional owners, operators and contractors is set forth in the County Plan, Chapter 3, Section C(10)(c). They include the requirements that:

> 3. It must be clear to an inspector that the [recycling] system is being serviced: i.e., containers must be clearly marked and the area neatly maintained; there must not be garbage in the recyclables or recyclables in the garbage; container capacity must be adequate to hold materials between pick-ups.

• • •

(Cont'd)

On or about October 2, 2000, the Department attempted to conduct a recycling compliance inspection of the Viking Terminal pursuant to its authority and responsibility under SWMA and CEHA. Petitioner refused to allow the Department's inspectors to enter the Terminal. Thereafter, despite the presentation of credentials and legal authority to undertake the inspection, Petitioner remained steadfast in his refusal to allow the Department to conduct a compliance check. In fact, Petitioner threatened that any Department employees would be treated as criminal trespassers. The Department had no recourse but to seek judicial intervention.

## PROCEDURAL HISTORY

On December 28, 2000, the Department filed a Verified Complaint and Order to Show Cause seeking an order of entry onto the Viking Terminal property for the purpose of conducting its recycling compliance inspection. An Order to Show Cause was entered on January 10, 2001, ordering Petitioner to show cause why the relief requested should not be granted. Petitioner filed an Answer on January 29, 2001. An initial hearing was held on February 16, 2001, before the Honorable Marina Cordemus, J.S.C. Judge Cordemas carried the matter. Following reassignment of the matter to the Honorable Melvin Gelade, J.S.C., a second hearing held on July 6, 2001. The court orally entered an order that directed

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(Cont'd)

> 5. The owner/operator/contractor is responsible for arranging for the recyclables to be moved from the premises and for assuring that they go into the recyclables market. . . .

[Pa24]

Petitioner to allow the inspection to be conducted within thirty (30) days. The court also denied Petitioner's request for a stay. A conforming order was entered on July 20, 2001, which included provision for the payment by Petitioner of $5,000 in fees to the Department if this appeal was not successful. (Pet. App. 10a-12a)

On August 3, 2001, Petitioner filed his Notice of Appeal and an emergent application seeking a stay of the trial court's order. The New Jersey Appellate Division denied the latter application by order entered on August 10, 2001. On June 11, 2002 the Appellate Division affirmed the trial court holding the arguments were "without significant merit to warrant discussion . . ." (Pet. App. 1a-4a).

On October 17, 2002, the New Jersey Supreme Court denied Petitioner's petition for certification and dismissed his appeal. (Pet. App. 9a). This application for a writ followed.

## SUMMARY OF ARGUMENT

**Administrative searches conducted pursuant to the recycling compliance programs of the Middlesex County Health Department conform to statutory and established constitutional standards, thus, there is no compelling reason to grant this writ.** Petitioners business, as well as other tenants of his industrial park, are involved in activities likely to generate highly regulated waste products. This Court, as well as the courts of the State of New Jersey, have held that in a pervasively regulated industry such as this, warrantless searches may be conducted so long as there is a "substantial" government interest, the inspections are necessary to further the regulatory scheme and the inspection

program in terms of certainty and regularity of its application provides an adequate substitute for a warrant. The recycling compliance programs of the County meet these standards. Petitioner's argument that a writ must issue because a warrant is needed to search must fail because the case law in this area is well settled and the opinions below so holding are not in conflict with any settled precedent. In short, there are no compelling reasons for granting Petitioner's application for a writ of certiorari.

**The Middlesex County Health Department is entitled to its fees upon prevailing on Petitioner's challenge to the inspection.** Pursuant to N.J.S.A. 13:1E-9(d)(2), the Health Department is entitled to a fee award where an inspection is blocked by the defendant. An Order to this affect was submitted to the trial court, the fee portion asking for $12,490.46 supported by documentation. Petitioner objected to the fee arguing lack of notice and that the fee was inappropriate. Petitioner did not request argument nor did he question the amount sought. Nonetheless, the trial court reduced the award to $5,000. This process and fee amount has been upheld by latter court opinions. Clearly, Petitioner was given the opportunity to object, did so and in effect was partially successful. His due process rights remain in tact. Again, there is no compelling reason to grant Petitioner's application for a writ on the issue of fees.

## REASONS FOR DENYING THE PETITION

### POINT I

### THE RECYCLING COMPLIANCE PROGRAMS OF THE MIDDLESEX COUNTY HEALTH DEPARTMENT CONFORM TO STATUTORY AND SETTLED CONSTITUTIONAL STANDARDS

Petitioner challenges the authority of the Department to inspect his commercial property for compliance with the environmental laws and regulations of this State as violative of the Fourth Amendment to the United States Constitution. This argument is plainly without merit and must fail. The authority of the Department to conduct routine inspections is clearly and properly premised upon State statutes and regulation, and does not contravene any constitutional provisions.

The Department's authority to inspect the Viking Terminal derives from the Recycling chapter of the County Plan. That document sets forth in relevant part as follows:

> The Middlesex County Field Recycling Inspection Team will **conduct a year-round inspection program to assure that multi-family, commercial and institutional generators of solid waste and recyclables understand and comply with their responsibilities under the County Plan and State law.** This generator inspection program will operate in all municipalities. Follow-up inspections will be made to generators found to be in violation of the compliance provisions of this plan. Notices of

> Violation and Penalty Assessments will be issued as appropriate. The inspectors will be members of the County Health Department and derive authority from the Solid Waste Management Act (N.J.S.A. 13:1E-1 *et seq.*) via the County Environmental Health Act. (N.J.S.A. 26:3A2-21, *et seq.*) The Penalty Schedule for recycling violations will be between $25 and ~~$2,500~~.
>
> (Emphasis Added)

[County Plan, Chapter 3, Section C(6)(c)]

As set forth in the Statement of Facts, *supra*, the Department has been certified as the local CEHA agency with responsibility to enforce and monitor compliance with the County Plan, as well as SWMA and other environmental statutes, rules and regulations. CEHA specifically provides that the administration of the responsibilities of a CEHA county health department shall include the following:

> The monitoring and enforcement of environmental health standards, the operation of a technical resource center and the enactment and enforcement of environmental health ordinances to control air pollution, solid waste, hazardous waste, noise, pesticides, radiation, and water pollution, to protect workers and the public from hazardous substances and toxic catastrophes, and to protect against other threats to environmental health.

[N.J.S.A. 26:3A2-22]

CEHA defines "monitor" to include "check, test, observe, survey or **inspect to determine compliance** with environmental health standards." N.J.S.A. 26:3A2-23(e) (emphasis added). A CEHA certified agency also has the delegated authority granted to the NJDEP to act as its agent in areas involving environmental health. This includes the right to enter and inspect "any business premise or building during normal hours or other reasonable times." N.J.A.C. 7:1G-1.5. Accordingly, there can be no doubt that the Department had the statutory and regulatory authority to inspect the Viking Terminal commercial premises for compliance with the solid waste and recycling provisions of the County Plan. The same conclusion must be reached by this Court with respect to the constitutional scope of the Department's inspection authority.

The initial inquiry in any Fourth Amendment challenge must examine whether the activity being questioned constitutes a search. The Department will concede for purposes of this argument that its recycling compliance inspection of the Viking Terminal would have constituted a search. Once a determination is made that a "search" has occurred within the meaning of the Fourth Amendment, the government must show that the search was "reasonable" to survive constitutional scrutiny.

There are several ways in which a Fourth Amendment search may be found to be reasonable. The obvious means of satisfying the reasonableness standard is through the judicial issuance of a search warrant. However, it is also well-established that there are categories of warrantless searches that have also been upheld as reasonable. For example, administrative inspections in highly or pervasively regulated industries have been permitted without probable cause or

individualized suspicion as one of the exceptions to the warrant requirement and do not violate the constitutional proscription against "unreasonable searches and seizures." *New York v. Burger*, 482 U.S. 691, 712 (1987) (upholding suspicionless search of automobile junkyard); *Camara v. Municipal Court*, 387 U.S. 523, 540 (1967) (employing balancing test to assess validity of administrative search).

The administrative search exception has been used regularly to permit legislatively authorized warrantless inspections of commercial property in cases in which the government interest in conducting the search would be frustrated by requiring prior notice. *See Donovan v. Dewey*, 452 U.S. 594, 598-603 (1981). *See also United States v. Biswell*, 406 U.S. 311, 317 (1972) (administrative search exception extended to safety inspections of firearms dealers); *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 76-77 (1970) (approving congressional scheme of warrantless searches and seizures in liquor industry in light of long history of regulation of this industry); *Transport Workers' Union of Philadelphia, Local 234 v. Southeastern Pennsylvania Transp. Auth.*, 884 F.2d 709 (3d Cir. 1989) (random drug testing of employees in safety-sensitive positions was carefully and constitutionally tailored).

Our New Jersey courts also have applied these constitutional standards and found similarly that persons who engage in industries "subject to close supervision and inspection" have a diminished expectation of privacy. *In re Martin*, 90 N.J. 295, 313-14 (1982) (finding that casino employees have a "limited" expectation of privacy based on pervasive regulation of casino industry); *New Jersey Dep't of Envtl. Protection v. Duran*, 251 N.J. Super. 55, 62-63

(App. Div. 1991) (fishing industry is pervasively regulated and warrantless inspection of vessel in possession of illegal lobster tails upheld). In order to uphold this regulatory class of inspections or searches, the courts have established the following standard of review:

> [W]arrantless searches conducted under the pervasively regulated industry exception are deemed to be reasonable only so long as three criteria are met. First there must be a "substantial" government interest that informs the regulatory scheme pursuant to which the inspection is made. . . . Second, the warrantless inspections must be "necessary to further [the] regulatory scheme." . . . [And, f]inally, "the statute's inspection program, in terms of the certainty and regularity of its application [must] provid[e] a constitutionally adequate substitute for a warrant." *Burger, supra*, 482 U.S. at 702-03, 107 S. Ct. at 2644, 96 L. Ed. 2d at 614 (citations omitted).

[*New Jersey Transit PBA Local 304 v. New Jersey Transit*, 147 N.J. 259 (1997)]

There can be no genuine dispute that the recycling and disposal of waste materials by businesses in New Jersey is a pervasively regulated area and has been for several decades. There is a strong public interest in the orderly disposition of New Jersey's solid waste because it is "a matter of grave concern to all citizens" and "an activity thoroughly affected with the public interest," which has been mandated by the Legislature and recognized by the courts. *See, e.g.*, N.J.S.A. 13:1E-2; *A.A. Mastrangelo, Inc. v. Commissioner of Department of Envtl. Protection*, 90 N.J. 666 (1982);

*Southern Ocean Landfill v. Mayor of Ocean Township*, 64 N.J. 190, 193-94 (1974). The highly regulated system governing the management and disposal of solid waste in New Jersey grew out of a crisis that began in the 1970s as a result of wide-spread illegal practices in the then-private, unregulated waste disposal market and the closing of many landfills due to unsanitary conditions and noncompliance with newly enacted federal regulations. Mandatory recycling and reduction of the waste stream requiring ultimate disposal is a critical component of the SWMA. *Atlantic Coast Demolition & Recycling, Inc. v. Bd. Of Chosen Freeholders of Atlantic County et al.*, 48 F.3d 701 (1995). Thus, it is clear that the regulation of solid waste disposal and recycling by commercial establishments meets the substantial interest test under the Fourth Amendment.

The CEHA inspection program also meets the other two prongs of the *Burger* standard. Without the ability to conduct regular, unannounced inspections the Department has no way of determining whether the recyclable products generated by the Petitioner's owned and leased business properties are ending up in the proper end market. Waste items such as used motor fuel oil or tires cannot easily be traced or tagged once they leave the premises. An inspection can reveal whether recyclable materials are in the appropriate waste containers on site or whether Petitioner and his tenants have even established regular receptables and collection programs for such materials.

Furthermore, the inspections are regular, infrequent, nonintrusive and conducted only during reasonable and normal business hours. They are not conducted on the basis of unbounded discretion. Furthermore, the Department has never demanded an inspection of the personal residence of

Petitioner. Thus, the standard protocols of these inspections provide adequate protections and notice in lieu of a search warrant. *Transport Workers' Union*, *supra*, 884 F.2d at 711. It would be unreasonable and excessively burdensome for the Department to apply to a court for a search warrant in order to conduct routine environmental inspections of the thousands of business and commercial entities in Middlesex County.

In sum, the routine environmental inspection sought to be conducted at Petitioner's business properties was reasonable and did not violate Petitioner's constitutional right to be free from "unreasonable searches and seizures". Thus, the writ should be denied.

## POINT II

## MIDDLESEX COUNTY HEALTH DEPARTMENT IS ENTITLED BY STATUTE TO ITS FEES UPON PREVAILING ON PETITIONER'S CHALLENGE TO THE INSPECTION

Petitioner has also raised the argument that the Department is not entitled to the fees and costs it has been forced to incur by Petitioner's own unwarranted refusal to allow the inspection. Having defended its right to conduct the regulatory inspection, the Department clearly is entitled to its reasonable fees. N.J.S.A. 13:1E-9(d)(2); County Plan, Ch. 2, Section D(11).[2]

---

2. Middlesex County Public Health Department Enforcement Protocol provides:

> The violator [of rules and regulations governing solid waste], if found guilty, shall be liable to pay the Court

(Cont'd)

Moreover, Petitioner had adequate notice that fees would be sought by the Department if judicial intervention to enforce the SWMA and the County Plan was necessitated by Petitioner's actions. *Id.* The Verified Complaint also apprised Petitioner that fees would be demanded as part of the relief sought. The Order of the Court below set forth that the reasonable level of those fees was $5,000 and would not be due and owing unless and until the Department prevailed on the appeal. (Pet. App. 12a)

While the Department sought fees in the amount of over twelve thousand dollars ($12,000), which were genuinely incurred by it in prosecuting its Order to Show Cause, and has now had to incur the additional legal expenses of the appeal and this petition, the Department did not take a cross-appeal on the issue and will abide by the trial judge's assessment. The Department and the lower court were fully justified in making this assessment against Petitioner. But for his refusal to allow the fully authorized Department inspectors to do their job, these legal costs would not have been incurred. It is unreasonable to expect the other businesses in Middlesex County to bear the financial burden of Petitioner's obstinacy.

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(Cont'd)

> Judgement. . . . In addition, any person(s) found guilty of a solid waste violation shall be liable for all costs incurred by the County of Middlesex including all litigation costs, fees, and expenses.

## CONCLUSION

For the reasons set forth above, the Middlesex County Health Department respectfully requests that this Honorable Court deny the Petition.

Respectfully submitted,

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Supreme Court, U.S.
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(3)

No. 02-1064

IN THE

# Supreme Court of the United States

PETER ROEHSLER,
*Petitioner*

v.

MIDDLESEX COUNTY HEALTH DEPARTMENT,
*Respondent*

On Petition For Writ Of Certiorari
To The Supreme Court of New Jersey

## REPLY TO BRIEF IN OPPOSITION

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## POINT I

**WHERE RESPONDENT HAS ASSERTED A FACT NOT IN EVIDENCE, THAT IS FALSE, AND BASED ITS ARGUMENT THEREON, THAT ARGUMENT SHOULD BE DISMISSED.**

Respondent's brief, in its Summary of Argument, page 6, states: "This Court, as well as the courts of the State of New Jersey, have held that in a pervasively regulated industry such as this [the Petitioners and his tenants], warrantless searches may be conducted...

Neither Petitioner nor any of his tenants operate "pervasively regulated industries." Indeed, that assertion has never been made prior to this. It is utterly false.

The opinion of the Superior Court, which has not been modified by any higher court, recognized that this was true when it held that "there's a connection between the highly regulated industry [solid waste] [and] those companies [the Petitioner's and his tenants]." (T7/6/01, 16) That court's ruling made it clear that although it saw a connection between the Petitioner's and his tenants' businesses and the pervasively regulated solid waste industry, it found that Petitioner and his tenants operated ordinary non pervasively regulated businesses.

Respondent's argument is based on the premise that Petitioner's business and those of his tenants are highly regulated industries. The cases cited and the standards stressed all clearly apply to highly regulated industries or businesses and not ordinary businesses such as Petitioner's and his tenants. Because of that false premise the argument should fail.

Finally Petitioner addresses Respondent's argument that "it would be unreasonable and excessively burdensome for the department to apply to a court for a search warrant." That issue has been discussed by this Court which has consistently held that requiring warrants to inspect will not impose serious burdens on the inspection system or the courts.[1] It certainly would have been a easier than filing a verified complaint and an order to show cause in the Superior Court of New Jersey.

Respondent has failed to address Petitioner's argument and instead, submitted facts not in evidence, that are false, and based its argument on them, therefore its argument against issuance of the writ should fail.

1. see *Marshall v. Barlow's Inc,.436 U.S. 307 (1978); Camara v. Municipal Court, 387 U. S. 523 (1967)*

## POINT II

**WHERE RESPONDENT HAS RAISED THE ISSUE OF STATUTES AND A COUNTY PLAN THAT CAN NOT APPLY TO THE PETITIONER, ITS CHALLENGE TO THIS PETITION SHOULD FAIL.**

Respondent has cited N.J.S.A. 13:1E-9d(2) in its brief, which applies to "solid waste collection and disposal." It is more easily understood when the relevant sections are reproduced as follows:

> N.J.S.A. 13:1E-9a. "All codes, rules and regulations adopted by the department related to **solid waste collection and disposal** have the force and effect of law...
>
> The department and the local board of health, or the county health department, as the case may be, shall have the right to enter a solid waste facility at any time in order to determine compliance with the registration statement and engineering design, and with the provisions of all applicable laws or rules and regulations adopted pursuant thereto."
>
> 13:1E-9d "The commissioner, a local board of health or county health department may institute an action or proceeding in the Superior Court for injunctive and other relief, including the appointment of a receiver for any **violation of this act, or of any code, rule or regulation promulgated, permit issued or solid**

**waste management plan** adopted pursuant to this act and said court may proceed in the action in a summary manner. In any such proceeding the court may grant temporary or interlocutory relief, notwithstanding the provisions of R.S. 48:2-24.

Such relief may include, singly or in combination:

13:1E-9d(2) Assessment of the **violator** for the costs of any investigation, inspection, or monitoring survey which led to the establishment of the violation, and for the reasonable costs of preparing and litigating the case under this subsection." (emphasis supplied)

This clearly applies to a violation of the "Solid Waste Management Act" which can not apply to the Petitioner, because he has never been charged with or convicted of a violation. Additionally he is not engaged in either the collection or disposal of solid waste.

Respondent cites the County Plan, Chapter 2, Section D (11), which it paraphrased. What it states at length follows:

**Chapter 2, Section D(11)** "Any violation of those rules/regulation governing solid waste in the County of Middlesex, State of New Jersey falling under the authority of the Middlesex County Public Health Department are subject to

prosecution in the Superior Court of Middlesex County. The violator, if found guilty, shall be liable to pay the Court Judgement to the Middlesex County Health Department.

In addition, any person(s) found guilty of a solid waste violation shall be liable for all costs incurred by the County of Middlesex including all litigation costs, fees and expenses...

Penalties for violations of the above requirements are contained in **Appendix VI.**

**Appendix VI:** "The following penalties are established for hauler violations of **Chapter 2, Section D** of the Solid Waste Management Plan. Non-Submittal and/or falsification of Monthly Tonnage Report; and/or non payment of Solid Waste Management Fees:

1st offense ..... $750.00

2nd offense.....$1,000.00

Each subsequent offense within a 12 month period shall double the penalty, i.e.

3rdoffense .....$2,000.00

4th offense.....$4,000.00

5th offense.....$8,000.00

Late Submittal of monthly Tonnage Report and/or non payment of Solid Waste Management Fees

$50 per day up to 15 days,

after 5 days, offense is considered

Non-Submittal.

Chapter 2, Section D and Appendix VI clearly and unmistakably apply to "waste haulers" and not to an individual who would stand up for his rights. Respondent goes so far beyond creative construction as to reach the height of absurdity where it tries to apply this regulation to your Petitioner.

Petitioner has never been accused of any violations under Chapter 2, Section D (11). How could he possibly be, where he could not have violated it because he is not required to file any "monthly tonnage reports" or pay any "solid waste management fees."

If, indeed, Petitioner had not been denied his right to due process guaranteed by the Fifth and Fourteenth Amendments of the United States Constitution by the New Jersey courts he would have had the opportunity to raise this argument and enforce and protect his rights.

Once again Respondent asserts that its proposed form of order in the New Jersey Superior Court, was conforming when it was clearly not, and should never have been either submitted or signed. Indeed, Petitioner's objection to that order was sufficient notice to the court that a hearing was required because his objection was not frivolous and the proposed form of order clearly did not memorialize the court ruling.

Respondent had no statutory authority to seek or obtain costs or fees from the Petitioner and its bold insertion of them in a proposed form of order, did not memorialize court's ruling, and was objected to by Petitioner, clearly calling for further judicial consideration if there was to be any protection of Petitioner's rights under the Fifth and Fourteenth Amendments of the United States Constitution.

Finally your Petitioner most respectfully submits that it does not constitute "obstinacy", as Respondent states, to seek the protection provided by the United States Constitution and that he should not have been penalized for doing so.

## CONCLUSION

For the reasons set forth above and the reasons set forth in the petition, your Petitioner most respectfully urges this Honorable Court to grant a writ of certiorari.

Respectfully submitted,

Peter Roehsler
Petitioner, pro se

February 18, 2003